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Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-379

M. J. PIROLLI & SONS, INC.,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, M. J. Pirolli & Sons, Inc., prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the First Circuit, entered on June 7, 1972, affirming and enforcing the order of the National Labor Relations Board issued against the petitioner on November 18, 1971.

Opinions Below

The Circuit Court of Appeals filed no opinion. The Decision and Order of the National Labor Relations Board (A. 330)[1] are reported at 194 NLRB No. 37.

[1] "A." references are to portions of the record printed in the Appendix filed in the Court of Appeals.

Jurisdiction

The decree of the Circuit Court of Appeals was entered June 7, 1972. (Appendix A, *infra* p. 14) The jurisdiction of this Court is invoked under Section 10(e) of the National Labor Relations Act (61 Stat. 147-148; 29 U.S.C. Section 160(e) and 28 U.S.C. Section 1254(1) (62 Stat. 928).

Question Presented

Whether a bargaining order should have been issued by the Board where the Board failed to consider or analyze the cleansing effect of a valid reinstatement offer of petitioner on the election atmosphere after finding violations of Sections 8(a)(1), (3) and (5) of the National Labor Relations Act.

Statutes Involved

The pertinent provisions of the National Labcr Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sections 151-168) and the Administrative Procedure Act (60 Stat. 237, as amended; 5 U.S.C. Sections 1001-1011) are set forth in Appendix B, *infra* p. 15.

Statement of the Case

Following the filing of charges on November 12, 1970 by Teamsters Local Union No. 379, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the "Union", alleging violations by petitioner of Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) petitioner answered admitting the jurisdictional allegations of the Complaint,

but denying the commission of any unfair labor practices. (A. 227)

A hearing was held before Trial Examiner Robert Cohn at Boston, Massachusetts on March 17, 18 and 19 and April 5, 1971. (A. 277)

The Decision and Recommended Order of Trial Examiner Cohn was issued on August 17, 1971. The Trial Examiner found that on or after November 7, 1970 the Union was the exclusive bargaining representative of all truck drivers, warehousemen and yardmen employed by the petitioner in Watertown, Massachusetts and that the petitioner refused to bargain with the Union on November 13, 1970 in violation of Sections 8(a)(1) and (5) of the Act. The Trial Examiner further found that the petitioner discharged twelve employees,[2] in order to discourage membership in the Union in violation of Sections 8(a)(1) and (3) of the Act and that the petitioner also violated Section 8(a)(1) of the Act by coercively interrogating these employees concerning their activities at the time of the discharges and by threatening reprisals for joining the Union. (A. 310, 311) These twelve employees had all signed Union authorization cards on Saturday, November 7, 1970.

Petitioner is a corporation engaged in selling and distributing building materials in Watertown, Massachusetts. For the payroll period ending November 19, 1970 the petitioner had listed on its payroll 23 employees who worked either as truck drivers or yardmen, among them three sons of Pirolli, Sr. (A. 247, 303)

Telegrams were sent by M. J. Pirolli & Sons on November 25, 1970 offering unconditional reinstatement to all of the alleged dischargees, with the exception of Mark Lynch.

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[2] They were: Mark J. Lynch, David Anderson, Lawrence Brophy, Windsor Bruce, Paul Cleary, Paul DiLuzio, Raffaele Franciosa, Ronald M. Ianazzi, Joseph Lynch, Philip Malkasian, Robert Morrissey and Leslie Poor.

As a result, Windsor Bruce, Larry Brophy and Joseph Lynch eventually returned to work for the petitioner. (A. 301-302) Trial Examiner Cohn found petitioner's telegram constituted a full and valid offer of reinstatement to all of the alleged dischargees except Mark J. Lynch. (A. 302)

The Recommended Order of the Trial Examiner required petitioner to cease and desist from the above-enumerated unfair labor practices, to take certain remedial action and to bargain with the Union on request. (A. 312-314) The petitioner duly took Exceptions to the Decision and Recommended Order of the Trial Examiner. (A. 316)

On November 18, 1971 the Board issued its Decision and Order adopting in full the Decision and Recommended Order of the Trial Examiner. (A. 331)

An Application for Enforcement of the Board's Order (No. 72-1030) was filed with the United States Court of Appeals for the First Circuit on February 1, 1972 and that Court issued its decree enforcing the Order of the Board on June 7, 1972.

Reasons for Granting the Writ

The basic reasons why petitioner submits the writ should be granted in this case are, first, that the Board, and the Circuit Court in enforcing its bargaining order, failed to adhere to the mandate of this Court in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), and, thus, are in conflict with an important decision of this Court; secondly, the United States Court of Appeals for the First Circuit, by its affirmation of the Board's order without remand, has failed to adhere to the interpretation of the *Gissel* case as made by other United States Courts of Appeals with respect to when remand is necessary, thus, in effect, creating a conflict in the Circuits.

The single issue which petitioner places before the Court here centers on the fact that neither the Trial Examiner

in making his Recommended Order nor the Board in issuing the bargaining order requiring petitioner to negotiate with the Union ever considered the petitioner's reinstatement offer in the context of its effect on election conditions, nor did they consider the petitioner's argument that the offer had a curative effect on the unfair labor practices, erased the effects of past practices and cleansed the election atmosphere. This was a critical factor which the Board should have analyzed. This failure of analysis was an abdication of responsibility on the part of the Board. It is submitted that the Board's failure to address itself to this reinstatement offer necessitates a remand to that body for proper consideration of this crucial element in determining whether the bargaining order should have been issued.

1. This case raises a novel question before this Court, as it did in the United States Court of Appeals for the First Circuit under the criteria for issuance of bargaining orders as expressed in *NLRB* v. *Gissel Packing Co., supra,* by this Court.

It is submitted that the question,[3] besides being one of novelty, is one of particular importance since the Board's decision, if allowed to stand, would not encourage employers to take voluntary remedial action of the sort taken here. This sort of voluntary cooperation with the aims of the Act has always been an important federal goal and one which many of the Board's own procedures are aimed at achieving. It is one which employers should not be discouraged from pursuing, as they would, if as here, their remedial actions were given no cognizance or treated as being of no legal consequence.

[3] As set forth at p. 2, *supra*, the issue of the effect of a reinstatement offer on the election atmosphere in the context of a case to which the *Gissel* criteria could be applied is revealed by research to be an issue to which the Board and Courts have not had the opportunity to address themselves since the issuance of the *Gissel* decision by this Court.

The problem of when a bargaining order can be issued as a remedy in situations where an employer refuses to recognize a Union's majority status as expressed through authorization cards, and commits unfair labor practices, was dealt with by this Court in the *Gissel* decision. In that case certain principles were laid down which were to be followed in this regard:

> "In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.
>
> • • •
>
> "There is, the Board says, no *per se* rule that the commission of any unfair practice will automatically result in a § 8(a)(5) violation and the issuance of an order to bargain." (*Id.* at 614, 615)

It is clear from such language that a bargaining order is not an automatic remedy available upon demand in cases where there have been unfair labor practices and a refusal to bargain with a union possessing a majority of cards.

The Board has indicated clearly that it interprets *Gissel*, *supra*, to stand for the following principles:

> (1) A bargaining order may be issued to redress unfair labor practices so coercive that such an order would be needed to repair their unlawful effect even

in the absence of a violation of the Section 8(a)(5) bargaining duty;

(2) Where the unlawful conduct is less flagrant the Board may find a Section 8(a)(5) violation and issue a bargaining order if the possibility of erasing the effect of the unfair labor practices and ensuring a fair election by the use of traditional remedies is slight and the employees' preference, as expressed through authorization cards, would be better protected by a bargaining order.

Garland Knitting Mills, 178 NLRB 396 (1969); *Marie Phillips, Inc.*, 178 NLRB 340 (1969).

Research, however, reveals no instance where the Board has issued, or the courts enforced, a bargaining order in the absence of a showing by the union of majority status based on valid authorization cards under the *Gissel* tests.

In this case both the Trial Examiner and the Board have quite obviously treated this as the second type of situation, namely, one where the possibility of a fair election is slight; this is apparent since the Trial Examiner spent so much time in his Decision discussing the issue of majority status. (A. 303-309) Specifically, the Trial Examiner found the acts of petitioner "... rendered nugatory any opportunity to resolve the representation question through the process of an NLRB-conducted election." (A. 309)

It is appropriate, indeed it is mandated, that a thorough examination be made of the particular unfair labor practices, their effects on the union majority, the likelihood of recurrence of such practices and the possibility of utilizing traditional remedies to eradicate the effects of these practices in this second type of situation especially. That this scrutiny is the job of the National Labor Relations Board was underlined in *Gissel*.

> "It is for the Board and not the courts, however, to make that determination [of appropriate remedy], based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies... the Board draws on a fund of knowledge and expertise all its own..." (*Gissel, supra* at 612, n. 32)

The Board has a duty to consider all relevant factors in determining what the effect of the unfair labor practices is on the election process and whether the severe remedy of a bargaining order is appropriate.

The Board majority in its decision on remand in the case of *General Stencils, Inc.*, 195 NLRB No. 173, 79 LRRM 1608 (1972) stated:

> "... initial impact is not the focus of our inquiry. Under *Gissel* we must attempt to measure the impact over time and, also, to assess the likelihood that any lasting impact can be mitigated by remedies short of an order to bargain." (*Id.* at 1609).[4]

It is submitted that the fact that petitioner in this case promptly made a valid reinstatement offer to eleven of the twelve discriminatorily discharged employees is certainly a salient fact which the Board should have taken into consideration in issuing its order. But it totally failed to devote itself to an analysis of this curative element.

In numerous cases, the Board has completely analyzed fact situations and determined that the proven unfair

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[4] Chairman Miller in his dissent further remarked:
"The impact on employees *might be erased if our standard make-whole remedy could be swiftly obtained.* But unfortunately, in the usual litigated case, restoration to employment comes months or years later, if at all, and thus the coercive effect of the discrimination is unlikely ever to be undone." (*Id.* at 1612; emphasis added)

labor practices were not severe enough to warrant a bargaining order and that traditional remedies could be effectively utilized. *American Leather and Suede*, 189 NLRB No. 95, 77 LRRM 1248 (1971); *Thomas Markets*, 191 NLRB No. 75, 77 LRRM 1451 (1971).

In the same vein are cases where it was held that the unfair labor practices had had minimal impact on the election machinery and thus a bargaining order was inappropriate. *Blade-Tribune Publishing*, 180 NLRB No. 56, 73 LRRM 1041 (1969); *Kut-Kwick Corp.*, 176 NLRB No. 86, 72 LRRM 1080 (1969); *Montgomery-Ward*, 187 NLRB No. 126, 76 LRRM 1195 (1971); *Dent-Poultry*, 188 NLRB No. 112, 76 LRRM 1557 (1971).

Similarly, in *Arbie Mineral Feed Co.* v. *NLRB*, 438 F.2d 940 (8th Cir. 1971), the Court held that the Board was warranted in finding that the employer had violated Section 8(a)(3) when he discharged a union adherent, allegedly for insubordination, since the employer's action was motivated at least in part by a desire to discourage union activity. But it was further held that the Board should not have issued a bargaining order against the employer because his unfair labor practices did not have an impact on the employees' allegiance to the union nor did the employer's unfair labor practices "pollute the election atmosphere." (*Id.* at 945)

A key element such as the good faith offer of unconditional reinstatement of the Union workers only a scant few weeks after the discharges certainly should have been considered by the Board since such an offer eliminates possible adverse impact of the dischargees on any subsequent election process and enormously minimizes the future effects of the unfair labor practices on union activity. In its effect on election conditions, such an offer can be equated with the Board's standard make-whole order.

2. It is submitted that the Board's total abdication of its responsibility to apply its knowledge and expertise to an analysis of the effect of such a reinstatement offer on election conditions requires a remand for a precise analysis as the *Gissel* decision dictates.

The United States Court of Appeals for the First Circuit in failing to so remand has departed from a consistent line of decisions by other United States Circuit Courts where those Courts have found the *Gissel* principles required a remand if a similar failure of analysis by the Board has occurred.

A key case in this area is *NLRB* v. *American Cable System*, 427 F.2d 446 (5th Cir. 1970). Here the Board had made a finding in 1969 that the employer's violation of Sections 8(a)(1) and (3) in 1965 precluded a fair representation election and caused such election to be a less reliable guide to employees' fair choice than signed authorization cards. The Court of Appeals held that this was insufficient under the *Gissel* rule since the Board had refused to consider any evidence on changes over the four years that might have made a free election possible. Similarly, the Board in this case failed to consider the significant change of a reinstatement offer which could make a free election possible. In *American Cable, supra*, the Court underscored the *Gissel* theme that a bargaining order was not one to be quickly granted. There must be a consideration of the current effect of those unfair practices and what steps have been or can be taken to remedy such effects:

> "The Court in *Gissel* thus placed bargaining orders on a card majority in a special category: an extraordinary remedy available to the Board to overcome the polluting effects of the employer's unfair labor practices on the electoral atmosphere. The order is not a traditional punitive remedy, but is a therapeutic one.

> It is not, therefore, the type of remedy which is automatically entitled to enforcement at any time after the occurrence of the unfair labor practice.... *Gissel* does not apply a nunc pro tunc principle, giving the then sins of the Company a now application. It requires contemporaneity—a present view, albeit with an historical perspective. Industrial democracy should be allowed to work its will if the present conditions are sufficiently antiseptic for an election." (*Id.* at 448-449)

In *New Alaska Development Corp.* v. *NLRB*, 441 F.2d 491 (7th Cir. 1971), the case was remanded when the Board failed to consider the impact of the unfair practices upon the election as well as—

> "...whether the practice might recur; whether there is only a slight possibility that the impact could be erased by 'traditional remedies' to ensure a fair election rerun; and whether on balance the employee sentiment in the pre-election cards would be better protected by a bargaining order." (*Id.* at 494).

In *NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 415 F.2d 1133 (6th Cir. 1969), the proven unfair labor practices included discriminatory discharges. The Court remanded the case to the Board to determine in the light of *Gissel*, whether traditional remedies could be used instead of a bargaining order.

In *NLRB* v. *Gibson Products*, 421 F.2d 156 (5th Cir. 1969), there was unlawful interrogation, withdrawing of privileges, promising of benefits and surveillance of union meetings. The Court remanded back to the Board, explaining:

> "In the instant case the validity of the union cards and their majority status is unquestioned. Also clear is the existence of certain employer unfair practices. However, the Board made no finding as to whether

> these violations so contaminated the electoral atmosphere that 'the possibility of erasing' their effects and 'ensuring a fair election' was 'slight'. Nor did the Board determine whether 'employee sentiment' could 'best be protected' in this case by a bargaining order." (*Id.* at 157).

Other cases where there has been a remand to the Board to determine the effects on the election atmosphere of the unfair practices include: *NLRB* v. *General Stencils, Inc.*, 438 F.2d 894 (2nd Cir. 1971); *NLRB* v. *Miller Trucking Service, Inc.*, 445 F.2d 927 (10th Cir. 1971); *NLRB* v. *Crystal Tire Company*, 410 F.2d 916 (8th Cir. 1969).

Reinstatement is a very significant factor. In cases where a discriminatory discharge lies at the base of an unfair labor practice charge, the employer's offer of reinstatement has been held to be a factor to be considered in determining the validity of such a charge. See *Chem-Spray Filling Corp.*, 176 NLRB No. 103, 73 LRRM 1379 (1969); *American Leather and Suede, supra.* While petitioner does not seek in this writ to have this Court consider the issue of overturning the findings of discriminatory discharge, it does submit that its offer of reinstatement to those discharged workers should certainly have been at least considered by the Board in determining the propriety of issuing a bargaining order in terms of the offer's over all effect on the election process and union activity and the degree to which it eliminated those difficulties which a bargaining order is aimed at removing. The Board averted its clearly defined duty to weigh such an important element in deciding to issue its bargaining order. Because the Board did so fail to consider it, the case should have been remanded to that body for proper consideration of the petitioner's offer of reinstatement. The failure to do so by the United States

Court of Appeals for the First Circuit warrants the granting of this writ.

Conclusion

Wherefore, it is respectfully submitted that for the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

DECREE

Entered: June 7, 1972

This cause came on to be heard upon petition for enforcement of an order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the National Labor Relations Board of November 18, 1971, is hereby affirmed and enforced.

By The Court:
(s) DANA H. GALLUP
Clerk

APPENDIX B

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372; 49 Stat. 449; US Code, Supp. IV, Title 29, sec. 151 *et seq.*) are as follows:

"Sec. 7

"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

"Sec. 8

"(a) It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

• • •

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

• • •

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9a.

"Sec. 10

* * *

"(c) ... If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

* * *

"(e) ... The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive...."

Administrative Procedure Act:

"Sec. 8

* * *

"(b) ... All decisions (including initially recommended or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record...."

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
[CAPTION OMITTED]

TRIAL EXAMINER'S DECISION

Statement of the Case

ROBERT COHN, Trial Examiner: This proceeding, tried before me at Boston, Massachusetts, on March 17, 18, and 19, and April 5, 1971, with all parties present and represented by counsel, involves a complaint issued[1] pursuant to Section 10(b) of the National Labor Relations Act, as amended (herein the Act), alleging that M. J. Pirolli & Sons, Inc. (herein the Company or Respondent), interfered with, restrained, and coerced its employees in the exercise of rights guaranteed under Section 7 of the Act by certain conduct described more fully herein, including the discharge of employees in order to discourage membership in and activities on behalf of Teamsters Local Union No. 379, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein the Union), in violation of Section 8(a)(3) of the Act, and refusing to bargain with the Union in violation of Section 8(a)(5) of the Act. Respondent's answer admitted the jurisdictional allegations of the complaint, but denied the commission of any unfair labor practices.

At the trial, full opportunity was afforded all parties to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally on the record, and to submit briefs. Oral argument was waived. Helpful briefs were submitted by counsel for all parties, which have been duly considered. Upon the pleadings, stipulation of counsel, the evidence, including my observation of the demeanor of

[1] Dated December 18, 1970, based upon a charge dated November 12, 1970. All dates hereinafter refer to the calendar year 1970 unless otherwise indicated.

the witnesses,[2] and the entire record in the case, I make the following:

Findings of Fact

I. *Commerce*

Respondent, a Massachusetts corporation, is, and has been at all times material herein, engaged in the business of the sale and distribution of building materials. In the course and conduct of its business operations, it causes to be delivered at its Watertown, Massachusetts, location, directly from points located outside the Commonwealth of Massachusetts, building materials having a value in excess of $50,000 annually.

The Respondent is, and has been at all times material, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. *The Labor Organization Involved*

The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. *The Alleged Unfair Labor Practices*

A. *The Commencement of the Union Campaign*

As a result of discussions among the employees of Respondent respecting the desirability of being represented for purposes of collective bargaining by a labor organization, one of the employees, David Anderson, on or about November 5, contracted Union Representative Walsh. On Novem-

[2] Cf. *Bishop and Malco Inc., d/b/a Walker's*, 159 NLRB 1159, 1161.

ber 6, Anderson received union authorization cards from Walsh, and on Saturday, November 7, 12 of the Respondent's truckdrivers and yardmen signed the cards and returned them to Anderson. The latter returned them to Walsh who, on November 9, dispatched a letter to the Respondent which stated as follows:

> Michael J. Pirolli & Sons
> 56 Irving Street
> Watertown, Massachusetts
>
> Dear Sirs:
>
> Please be advised that a vast majority of the warehousemen and drivers of your company have designated Local Union #379 as their bargaining representative.
>
> Please advise me as soon as possible when it is convenient for your [sic] to meet with representatives of this Local Union to discuss a wage scale and agreement covering the employees referred to above.
>
> Sincerely yours,
>
> Local Union #379
> Paul V. Walsh
> Organizer

Although the record reflects that the aforesaid letter was mailed by United States certified mail in Boston, Massachusetts, on November 9, it was not apparently received by Respondent at its post office box in Watertown until November 13. Nor was a petition for election, which was filed by the Union with the Regional Office of the National La-

bor Relations Board in Boston on November 9, delivered to the Respondent at its post office box until November 13. In the interim, and more particularly on November 12, significant events took place at the premises of Respondent which gave rise to the principal issues in the instant proceedings.

B. *Events of November 12*

1. *The discharge of Mark J. Lynch*

This employee commenced working for the Company in November 1969 as a truckdriver. He is also referred to in the record as Walter Lynch, which is his father's name which the son utilized at the commencement of his employment in order to drive some of the Company's equipment.[3]

Lynch, along with 11 other employees, signed a union card on November 7, as above related.

Lynch was discharged on November 12 by Michael J. Pirolli, Sr., president and owner of the Company.[4] On that day, Lynch reported to work at the usual time, 6:30 a.m., received a loading slip from the office, and took it

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[3] Apparently the father had a license to drive 10-wheel equipment (a class II license) and Mark Lynch had no license at all. The father's license mistakenly reflected his age as 24; Mark Lynch, who was 18, was therefore able to "pass" with it. Subsequently, Mark Lynch was able to secure a class III (ordinary) license but never did acquire a class II license.

[4] The record reflects that the Respondent is a family-owned corporation with Michael J. Pirolli, Sr., being its founder, owner, and chief executive officer. He participates in the day-to-day activities of the corporation and, aside from William Qualters, the dispatcher, is the only conceded supervisor. However, one of his sons, Michael P. Pirolli, also works on a full-time basis for the Respondent, his status as a supervisor having been raised as an issue in the proceeding. (The General Counsel and the Charging Party contend that he is a supervisor; Respondent argues that he is not.) For the sake of brevity and clarity in this decision, these two persons will henceforth be referred to as Pirolli, Sr., and Pirolli, Jr.

to one of the forklift operators to load his truck. While he was waiting for the truck to be loaded, he received a summons over the loudspeaker to report to the office, which he did. Upon arriving there, Pirolli, Sr., told him to punch out—that he did not need him any more, and to go fix his license. This, according to the testimony of Lynch, was all of the conversation.[5]

Although Lynch left the office after the interview, he did not leave the premises. Pirolli, Sr., testified that following the exit interview, Qualters reported to him that Lynch had threatened to "get even" with Pirolli by bombing the place, or something to that effect. Pirolli went out into the yard and spoke further with Lynch who, at that time, was conversing with employee Robert Morrissey. Pirolli walked to where they were standing and told Lynch that he had been fired and that he wanted him to get off his property. Morrissey advised Lynch to leave, and the latter did so, punching out at 7:43 a.m.

2. *The alleged discharge of other employees*

Shortly following the termination of Mark Lynch on November 12, as above related, the 11 other card signers ceased working for the Company and left the premises. General Counsel and the Charging Party contend that the Company discharged these men and that was the reason for their departure; the Respondent contends that the men walked out or struck in protest of the firing of Mark Lynch. We now proceed to a consideration of the evidence on this issue.

[5] Pirolli, Sr., testified that, in addition to the matter of the license, he mentioned to Lynch the latter's burning out of two motors in his trucks and also a complaint from a customer that Lynch had given said customer "a lot of static" when Lynch delivered a load of material the preceding Tuesday. Lynch specifically denied that Pirolli said anything about any event that had occurred at the Stronghold Masonry Company, the customer involved. For reasons discussed, *infra*, I credit the testimony of Lynch over that of Pirolli.

It will be recalled that at the time when Pirolli, Sr., directed Mark Lynch to get off his property, Lynch was in a conversation with employee Robert Morrissey. Morrissey, who impressed me as being an honest and forthright witness, testified that the only part of the conversation he heard between Lynch and Pirolli was when the latter told Lynch to get off his property, "to get the hell out of here . . . ." Pirolli then turned to Morrissey and advised him that he had just fired Lynch because he was "no good" and a "troublemaker"; whereupon he inquired of Morrissey, "who's making all the trouble around here?" Morrissey responded that he did not know and that even if he did he would not tell Pirolli. The latter became angry at that remark and asked Morrissey if he was "one of them," to which Morrissey replied in the affirmative—that he had signed the card and that he was also steward.[6] Pirolli immediately responded that Morrissey was fired, muttered an obscenity, and directed Morrissey to "punch out. I don't need you." Morrissey then left his truck where the conversation had taken place and commenced to walk across toward the garage where the timeclock was situated. The record reflects that Morrissey punched out at 7:53 a.m. and drove his car off the premises immediately thereafter.

Employee David Anderson, who was at the time also waiting for his truck to be loaded, observed Pirolli, Sr., and Morrissey in a conversation but, according to his testimony, only heard the part when Pirolli told Morrissey that the latter was fired; Pirolli threw his hands into the air and said that whoever signed those cards were fired; and as he said this Pirolli was looking directly at Ander-

[6] The record reflects that during or after the employees signed the authorization cards, they sought to designate Morrissey as the union steward but he, initially, refused to accept the post. However, it appears that he subsequently relented and agreed to act as spokesman for the group.

son and since Anderson did sign one of the cards, he took it for granted that he was discharged. He therefore punched out also.

Ronald Ianazzi, a forklift operator for the Company, testified that on the morning of November 12 he observed Mark Lynch walking across the yard, and the latter advised Ianazzi that he had been fired. When Ianazzi asked why, Lynch responded that it had something to do "about my license." Ianazzi then observed Pirolli, Sr., talking with Morrissey but the only part of the conversation that he heard was Pirolli's telling Morrissey that he did not need him anymore. Pirolli then approached Ianazzi and told him "you, you're through, get the [obscenity] out of here." Ianazzi then proceeded to the garage to punch out when he heard Pirolli, Jr., who was standing in the yard, saying that "anyone who signed the card is fired."[7]

Leslie Poor was a mechanic for the Company. He testified that on November 12 he reported for work at approximately 7 a.m. and had commenced working on a few trucks when he heard some commotion at the other end of the garage. He heard Pirolli, Sr., say to someone (whom Poor was unable to identify), "get out of the yard and stay out." About 2 or 3 minutes later Pirolli, Sr., came to the front of the truck where the witness was working and asked if he had signed a union card. When Poor answered affirmatively, Pirolli, Sr., said, "Well, screw, we don't need you"; whereupon, Poor picked up his tools, placed them in the toolbox, and punched out. Poor testified that while he was putting his tools away, Pirolli, Sr., "came in and started yelling at [him] . . . after all we've done for you . . . . We've lent you money, we've let you use the truck. And, you turn around and do this to us." About that time, Dispatcher Qualters stuck his head

[7] The record reflects that Ronald Ianazzi punched out that morning at 7:55 a.m.

through the window from his office into the garage and asked what was going on, to which Pirolli, Sr., pointing at Poor, said, "he's one of them."

Philip Malkasian had only started working for the Company on November 3. On November 12, he reported for work at approximately 6:30 a.m., swept out the cement house, and then was called in to make a delivery. However, the truck would not start so he contacted Poor, the mechanic. The latter was in the process of putting in a new battery when, according to Malkasian's testimony, both Pirolli, Sr., and Pirolli, Jr., came over. The former asked, "if we had a union would you join it?" Poor replied, "yes." Pirolli, Sr., then asked if he signed a union card and Poor again answered affirmatively; whereupon Pirolli, Sr., said "get the [obscenity] out." As both of the Pirollis commenced to walk away, Pirolli, Jr., turned around and asked if Malkasian had signed a card also. When he answered, "yes," Pirolli, Jr., said "get the [obscenity] out." As he was leaving, he heard Pirolli, Sr., say that anyone who signed a card was fired.

Raffaele Franciosa, a truckdriver for the Company, testified that on November 12 he reported for work at approximately 6:30 a.m. and was sent immediately to East Watertown, Massachusetts, to pick up a load of material; that when he returned at approximately 8 a.m. he heard that Lynch had been fired and he heard Pirolli, Sr., tell Morrissey that "you're fired"; that he then observed Pirolli, Sr., and Pirolli, Jr., walking about the yard advising employees that if they had signed a card they were fired; that Pirolli, Jr., personally asked him if he'd signed a card, and when Franciosa replied affirmatively, Pirolli, Jr., said, "you're fired. Get out." Franciosa further testified that as the employees were leaving the premises he

heard Pirolli, Jr., say to them, "I swear I'll kill any one of you who comes back here."[8]

Paul Di Luzio, a truckdriver, began work on November 12 at approximately 6 a.m. According to his testimony, he brought his truck to the middle of the yard to be loaded and then went up into the yard to wait on customers. Shortly thereafter, employee Windsor Bruce came up to him and told him that Morrissey had been fired and asked if Di Luzio intended to go out with them. Di Luzio asked Bruce who else was getting fired, and the latter responded, "Walter Lynch and a few others when they come back from their loads."[9] Di Luzio started walking toward the garage when he met Pirolli, Jr., who stopped him and asked if he had signed a union card, stating that anyone who signed a union card was automatically fired. Di Luzio proceeded over to the garage to punch out on the timeclock. As he proceeded through the garage, Pirolli, Sr., approached and asked if he was with him (Pirolli) or with the other fellows, to which Di Luzio replied that he was with the majority "and besides he was fired anyway."

Paul Cleary, a truckdriver, commenced work on November 12 at approximately 6:30 a.m. He took a load of materials to a job in Malden, Massachusetts, and thereafter went to the premises of the Plasti-Crete Company, arriving about 9 a.m. There he saw employees Poor and Franciosa who advised him, briefly, of their version of what had transpired at the premises of the Respondent, i.e., that anyone who had signed a union card had been fired. Cleary returned to the Respondent's premises, arriving there approximately 9:30 a.m. and went into the office. There, he saw Pirolli, Sr., and Dispatcher Qualters, and the former asked him if he had signed a union card. When

[8] Several other employees, including David Anderson, Ronald Ianazzi, and Paul Di Luzio, testified to the same effect.

[9] Testimony of Di Luzio. Windsor Bruce, although presently working for the Respondent, was not called as a witness.

he replied affirmatively, Pirolli said "get out," and Qualters said "punch out."[10] Cleary then proceeded to the garage, punched out, and headed across Irving Street to where his car was parked. At this time Pirolli came out and stated that he had built the place with his bare hands and "no bunch of bastards are going to run it for me." He grabbed Cleary by the shoulders as if to hit him and the latter stated, "Go ahead, Mike. Right here in the street." Pirolli dropped his hands at that.

Lawrence (Larry) Brophy, a truckdriver, reported for work approximately 6:30 a.m. and took a load of wallboard to Summerville, Massachusetts. Upon his return, but before he reached the premises of the Respondent, he saw Mark Lynch on a bridge on Arsonal Street (which runs beside the Respondent's premises), at approximately 8:30 a.m. Lynch advised him that he had been fired, and they went to a nearby coffeshop for a cup of coffee. Brophy returned to the Company's premises and went into the office where he had the following conversation with Dispatcher Qualters:

> A. He asked me if I'd signed a Union card. And I asked him what business was it of his. He said, "It makes no difference. We already know that you've signed the card. I said, "Well, if you already know, what are you asking me for?"
>
> Q. I didn't hear that. Say that again?
>
> A. He said—I said, "If you already know, what are you asking me for?" He said, "Well, if you've signed the Union card, you're fired." And I asked him to repeat it, and he said, "If you've signed a union card, you're fired."

[10] Qualters was not called as a witness even though at the time of the hearing he was still employed by the Respondent as a dispatcher, a conceded supervisor.

Q. Do you recall if anything else was said at that time?

A. Well, there was a little banter back and forth as I was punching out. Mr. Qualters asked me if I—why would I do something like this to Mike? And I said, "Do something like what to Mike," and he was still mumbling as I left.

Q. At any time after Mr. Qualters asked you about signing the card, did you tell him whether you signed the card or not?

A. Yes, I did.

Q. What did you say to him?

A. I said, "Yes, I did sign the union card."

Q. Was that before he told you to punch out?

A. I believe it was, yes.

After Brophy punched out, he went back to the diner and picked up Lynch and both of them went to a nearby restaurant called Dunkin Donuts where the other terminated employees had gathered. It was at that location that employee David Anderson telephoned Union Representative Walsh and advised him of what had occurred.[11] Within a few hours, Walsh filed the charge in the instant case and the employees established a picket line about the pre-

[11] Many of the employees testified that while they were at the Dunkin Donuts Restaurant, Mrs. Yolanda Pirolli, wife of Pirolli, Sr., came to the restaurant, apparently for the purpose of obtaining coffee. While there, she allegedly uttered a threat to the employees which the General Counsel urges is a violation of Section 8(a)(1). However, I find insufficient evidence in the record to support the allegation that Mrs. Pirolli was a supervisor or agent of the Respondent during this period. It is true that she spent a substantial amount of her time at the premises of the Respondent (apparently as a result of the fact that her children were no longer at home and that she wished the company of her husband), but there is scant, if any, evidence that she either possessed or exercised any of the indicia of supervisory authority set forth in Section 2(11) of the Act. Accordingly, I will recommend that those allegations of the complaint be dismissed.

mises of the Respondent. The parties stipulated that the picketing commenced at 11 a.m. on November 12; the charge reflects that it was filed at the Board's Regional Office in Boston at 1:02 p.m. the same day.

The testimony of the Pirollis is much at variance with the foregoing. Pirolli, Sr., testified that after he directed Lynch to get off his property, the following conversation ensued between him and Morrissey:

> Well, Bob Morrissey is putting the forks in the trucks and he says to me—he says, "You know, Mike, you can't fire him." I says, "I can't fire him? What do you mean?" He says, "Well, you know, we all signed the cards last Saturday—the application cards to the Union—last Saturday and I am the shop steward." And he says, "As far as I'm concerned, you can't fire him."
>
> So, I says, "Bob, I don't know anything about unions at this place at this time. I don't know any notification of it whatsoever and as far as I'm concerned, as of this minute, I still own this business. Now, if you want to work, Robert, you can work, and if you don't want to work, you can go out with him." And I said, "That's all there is to it."
>
> And he says, "F- - -you," slams the door, and started to walk out. So, I started to walk out with him. The next thing I know I looked to the right and Ronnie Ianazzi—he's way over in this corner—he's running over to Bruce and he tells Bruce, "Come on. He's fired Morrissey."

Pirolli then testified that as he was walking through the yard, he heard Windsor Bruce ask Clifford Burdge if he was coming. Burdge asked, "where are you going?" To which Bruce said, "we're going out." Burdge replied,

"I'm not going nowhere. I'm staying."[12] Pirolli then testified that as he passed a truck in the yard, he spoke to Leslie Poor who was tightening a battery; that standing around the truck with him were Paul Di Luzio, Philip Malkasian, and Raffaele Franciosa; that Di Luzio and Poor started to walk across the yard when Pirolli asked Poor where he was going; and that Poor replied, "the majority is walking out and I've got to go with them." Pirolli testified that he then reminded Di Luzio that he had granted him many favors, such as saving his brother from going to jail and loaning Di Luzio money, but that Di Luzio responded that he had asked Pirolli for a raise which was not granted and he was "going out." Pirolli then testified that he went into his office and waited for his son to return from East Watertown;[13] Pirolli, Sr., testified that upon his son's return he told the latter that he had fired one employee and that many of the others were walking out but that meanwhile they had many orders to deliver to customers; that he then directed his son to "go down in the yard and go see what we got left. Ask who got cards or who wants to stay or who wants to go, but let's find out how many are left so that we can arrange to get our order out." Pirolli, Sr. staunchly maintained that he did not, as General Counsel's witnesses testified, go about the yard firing employees because they signed union cards; that, indeed, the only conversations with employees he had that morning were with Mark Lynch, Morrissey, and Di Luzio.

Pirolli, Jr., testified that he came in to work about 6:30

[12] As previously noted, Windsor Bruce was not called as a witness. Burdge testified that he had finished loading David Anderson's truck and was standing there when Bruce walked by and asked him if he was going. Burdge asked, "going where?" but Bruce did not respond and "just kept on walking."

[13] Pirolli, Jr., testified that he was absent from the Respondent's premises from approximately 7:30 to 8 a.m. due to a trip to a customer in East Watertown, Massachusetts, of which more anon.

a.m. on November 12 and worked about the premises until approximately 7:30 a.m. when his father asked him to go to East Watertown Cement Block Company because one of Pirolli's trucks was delayed in being loaded; that he proceeded to the Block Company (which normally takes about 5 or 6 minutes driving time), but that as he arrived there the Pirolli truck was pulling out of the Block Company's premises; however, he stayed and talked to the owner of the company, Paul Ianazzi (uncle of Ronald Ianazzi), about a new cement block machine; that he returned to the Respondent's premises at approximately 8 a.m. and that as he drove into the yard, many employees were headed out toward the street; that he went into the office and asked his father what was happening, to which his father replied, "well, they're all leaving"; that his father then directed him to find out who was staying so that they could get the trucks loaded; that he thereupon went into the yard and asked approximately four employees whether they signed a card and whether they intended to continue working; that the four he interrogated (Clifford Burdge, Gearhart Bernard, James Livings, and James McKinnon) all responded that they had not signed the cards and that they would continue working.[14]

Analysis and Concluding Findings Respecting Alleged Discharge of Mark Lynch and Other Employees on November 12

Respondent contends that Pirolli, Sr., had no knowledge of the union activities of its employees prior to his conversation with Morrissey on the morning of November 12; that he therefore did not know that Mark Lynch was involved in such union activities, and therefore such could

[14] Pirolli, Jr., testified that Burdge asked him, "does it make any difference?" to which he replied in the negative.

not be a reason for his discharge. However, it is by now a well-established principle that direct knowledge of an employee's concerted or union activities is not a "*sine qua non* for finding that he had been discharged because of such activities. On the contrary, there is well-established Board and court precedent that such knowledge may be inferred from the record as a whole."[18]

In the light of such precedent, and on the basis of a consideration of the entire record in this case, and particularly the following points in the record, I conclude that such an inference could and should be drawn: (1) the small number of employees at the facility (approximately 17-20); (2) the fact that during the approximately 5 days between the actual signing of the cards and the discharge, there is evidence of discussions among the employees respecting the signing of the union cards and what effect such union activities might have on Pirolli, Sr. Thus Yard Foreman Clifford Burdge, a witness for Respondent, testified that he knew that the employees were signing cards although he did not know exactly which employees; that on Wednesday, November 11 (which was normally a holiday although a few employees worked), Burdge and Windsor Bruce were working when Paul Di Luzio came in and wondered why he had not been asked to work. Di Luzio then said, "we'll see what happens after he [Pirolli, Sr.] gets the letter." Although Burdge denied telling either of the Pirollis or Qualters about this conversation, I believe that it is a tenable inference that in this closely held corporation—which Pirolli, Sr., described as a big family—knowledge of such activities which would come to a yard foreman would also likely come to the attention of the dispatcher and/or higher management; (3) the timing of the discharge which took place shortly after the card signing; (4) Pirolli, Sr.'s

[18] *Wiese Plow Welding Co., Inc.*, 123 NLRB 616, 618; see also *Texas Industries, Inc.*, 156 NLRB 423, 424-426.

conversation with Morrissey in which he inquired, "Bob, who is making all the trouble around here?" When Morrissey replied that he did not know, Pirolli asked directly, "are you one of them?" The foregoing questions, in my view, indicate a prior knowledge on the part of Pirolli that something untoward was occurring among the employees in the plant; that he was not altogether sure of the nature and extent of such activities and sought to find out from one of his older and trusted employees. In the absence of any other reasonable explanation on the record of any "trouble" around the plant, I am convinced that Pirolli used the term as a euphemism for union activities;[18] and (5) the abrupt and disparate manner in which Lynch was terminated. Thus, in his testimony, Pirolli, Sr., recognized that the matter of the license and the burned-out motors were not very substantial reeds upon which to base the discharge since, as the record reflects, other employees had been driving Respondent's equipment without adequate licenses and were not discharged. Also, if that item plus the burned-out motors had been a sufficient reason for discharge, such would have occurred in September or October when these events occurred. Accordingly, Pirolli, Sr., relied strongly on the asserted incident involving the Stronghold Masonry Company on November 10 as the proverbial "straw which broke the camel's back." However even if that incident occurred as was reported to Pirolli, Sr., by Qualters (who was not called upon to testify), it is quite significant that the decision to discharge was made, and the discharge was effectuated, without notifying Lynch and giving him an opportunity to present his side of the

[18] See, e.g., *Angwell Curtain Company, Inc.* v. *N.L.R.B.*, 192 F.2d 899 (C.A. 7), where it was found that a management representative reference to "this thing" meant "union activities."

story. This has been held to be evidence of discriminatory intent.[17]

Under all circumstances, I am convinced, and therefore find, that Respondent would not have discharged Lynch for the reasons asserted had it not known or believed him to have been a participant in the union activities of its employees, to which it was unalterably opposed. I therefore find and conclude that such discharge was in order to discourage union activities in violation of Section 8(a)(3) and (1) of the Act.

Resolution of the case as respects the termination of the other employees on November 12 turns principally upon a determination of credibility of witnesses. This difficult chore of a factfinder is not rendered less so in the instant case. However, after a careful consideration of all the testimony, including demeanor (see *N.L.R.B.* v. *Dinion Coil Company*, 201 F.2d 484, 487 (C.A. 2)), "along with the consistency and inherent probability of testimony,"[18] I find generally in favor of the witnesses for the General Counsel.

Thus, while some of such witnesses were more impressive on the witness stand than others, it is difficult to believe that all were fabricating when they testified that the Pirollis fired them upon learning of their union activities. This is particularly probable in the light of Pirolli, Sr.'s great antipathy toward the Union, as disclosed by the record,[19]

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[17] *Rockingham Sleepwear, Inc.*, 188 NLRB No. 110. See also *United States Rubber Company* v. *N.L.R.B.*, 384 F.2d 660, 662-663 (C.A. 5), where the court stated: "Perhaps most damning is the fact that both Brewster and Morales were summarily discharged after reports of their misconduct. . . . without being given any opportunity to explain or give their versions of the incidents."

[18] *Universal Camera Corporation* v. *N.L.R.B.*, 340 U.S. 474, 496.

[19] In addition to the other evidence hereinabove set forth, Cleary testified that Pirolli, Sr., told him in August that "he had beaten the Union once before and that if they tried again, he could beat them." Mark Lynch testified that on one occasion when Pirolli, Sr., was taking him to the registry to get his license, he stated that unions were no good and that, since the employees were getting paid close to union rate, "there would be no sense in going union."

and the highly charged emotional temperament of Pirolli, Sr.[20] Given this state of affairs—of some eight or nine employees leaving the Company's premises, with about 20 orders to deliver—I believe it highly unlikely that Pirolli, Sr., would have spoken only to Di Luzio in attempting to ascertain facts or entice the employees to remain at work. Moreover, in asserting the credibility of the testimony with respect to what occurred in the yard of the Respondent on the morning of November 12, I have given considerable weight to the failure of Respondent to call as a witness its supervisor and agent, William Qualters, to testify at this hearing inasmuch as he was intricately involved in much of the activity and many of the conversations that morning. Under these circumstances I am not only crediting the uncontradicted testimony of employees who attributed certain remarks to Qualters, but I am also inferring that had Qualters been called as the witness, his testimony would have been adverse to the interest of Respondent.[21]

It is true, of course, as Respondent argues, that there is some evidence in the record in support of its contention that the employees planned and executed a walkout or a strike on the occurrence of any adverse conduct on the part of Pirolli, Sr., to their union organizational activity. However, such evidence as there is is quite scanty and insubstantial when compared to the mass of evidence proffered by the counsel for General Counsel that the employees were

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[20] Even the brief of Respondent notes this particular trait of its president (Resp. br. p. 17). And Pirolli, Sr., testified that "by that time (9 a.m. on November 12) we were all kind of nerved up." See also testimony of Morrissey who stated, "it surprised me that he blew his top and fired me—you know. I wouldn't say I didn't expect it, but it just happened—bing."

[21] See II Wigmore, *Evidence* §§ 285, 290 (3d ed.); *Interstate Circuit, Inc., et al.* v. *U.S.*, 306 U.S. 208, 225, 226 (1939); *N.L.R.B.* v. *A.P.W. Products Company*, 316 F.2d 899, 903 (C.A. 2, 1963); *N.L.R.B.* v. *Wallick & Schwalm Co.*, 198 F.2d 477, 483 (C.A. 3, 1952); see also 5 ALR 2d 893, 896, 909-911.

in fact discharged. I have also considered as being entirely possible the circumstance that, while a few of the employees may have planned in advance to walk out if Pirolli discharged one of their number, Pirolli, Sr., may well have disrupted such plan by first discharging all who had signed union cards.

Respondent also contends that I should discredit the testimony of employee witnesses who testified, in substance, that Pirolli, Jr., stated several times in the yard that morning that anyone who signed union cards were automatically fired since Pirolli, Jr. testified that he was not present in the yard from approximately 7:30 until 8 a.m. due to his being on an errand to the East Watertown Cement Block Company. However, in addition to demeanor considerations, his candor and truthfulness were considerably impaired by the following answers to questions concerning the nature of the "cards" concerning which he was admittedly interrogating the employees:

> Q. Now, when you asked employees whether they signed a card did you indicate what kind of card you were speaking about? A. No, sir. I didn't know what card they had signed. The old man said—his exact words were, "They have signed cards. They are leaving. Find out who is staying of the people who have signed cards the people who haven't signed cards."
>
> Q. Do you know what type of cards you[r] father was referring to at that moment, sir? A. At that moment, no. At that moment it happened too fast to know what kind of card.
>
> Trial Examiner: Did you know that they were Union cards?
>
> The Witness: No, sir. Not at the time.
>
> Trial Examiner: What sort of card did he mean?
>
> The Witness: He had mentioned to me that they had signed cards.

Trial Examiner: But he didn't say "Union cards"?

The Witness: He didn't come out and say "Union cards." He said, "cards", and I just went out and asked had they signed cards.

Trial Examiner: Well, did you know what sort of cards you were asking about?

The Witness: Not at the time, sir.

The foregoing testimony is, in my view, highly incredible and taints other testimony of this witness as respects his activities that morning. Moreover, I do not consider that the testimony of Paul Ianazzi of the East Watertown Cement Block Company substantially corroborates Pirolli, Jr., as to the exact time he was at the Block Company's premises. Ianazzi's testimony was based not on a timeclock but rather on his estimate of the time it usually takes to load a truck. Finally, I have also considered that the testimony of Paul Ianazzi was proffered in violation of the rule handed down at the beginning of the hearing requiring sequestration of witnesses. While I have no doubt that such was an inadvertence on the part of the counsel for Respondent, nevertheless, I find that Paul Ianazzi's testimony did constitute an infraction of that rule and I have therefore given it little, if any, weight.

Accordingly, in the light of all of the foregoing, I find and conclude that the Respondent did, on the morning of November 12, discriminatorily discharge the following named employees because of their union activities, and I will recommend an appropriate remedy.[22]

[22] The employees are: David Anderson, Lawrence Brophy, Windsor Bruce, Paul Cleary, Paul Di Luzio, Raffaele Franciosa, Ronald Ianazzi, Joseph Lynch, Philip Malkasian, Robert Morrissey, and Leslie Poor.

C. *Events Following the Discharges; the Offer of Reinstatement*

As previously noted, the discharged employees, under the sponsorship of the Union, established a picket line about the Respondent's premises at approximately 11 a.m. on November 12. The record reflects that during the initial stages of the picketing, the picketers and the Pirolli's exchanged a number of uncomplimentary epitaphs and threats. There was, for example, testimony that on the afternoon of November 12, Pirolli, Sr., threatened the pickets that if they stepped foot on his property he would shoot them.[23] Pirolli testified that on the morning of November 12 his wife had received an anonymous, threatening telephone call which irritated him; that about 1 p.m. that day he advised the picketers that they had gone a little too far in threatening to cut the tires on his truck,[24] and bothering his wife; and that if he caught any of them on his property at night to do damage to his trucks he would shoot first and ask questions later.

On November 25, Pirolli, Sr., sent all of the employees named in footnote 22, above, a telegram containing the following message:

> You are hereby unconditionally offered reinstatement by M. J. Pirolli and Sons Inc. to your former position without loss of seniority or benefits.
>
> M. J. Pirolli

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[23] It was stipulated that Pirolli, Sr., in addition to his building materials business, was also a licensed dealer in firearms and kept a supply of guns and pistols on the premises. There is also testimony that Pirolli, Jr., and some of the employees had, in the past, shot rats on the premises from time to time.

[24] Apparently, Pirolli had heard from Paul Ianazzi that on November 10 one of Pirolli's drivers (Bob Morrissey) had advised Ianazzi to be careful with his trucks for cut tires and nails.

It is the position of the General Counsel that such telegram did not constitute an unconditional offer of reinstatement because of a statement allegedly made by Pirolli, Sr., on the picket line shortly after the telegram was sent. It is also the position of counsel for the General Counsel and counsel for the Charging Party that, in addition, the discharged employees were privileged not to comply with the offer because of the threats of personal injury, should the employees come on their property, made by the Pirollis, as hereinabove set forth. We now proceed to a consideration of the evidence respecting this issue.

The record reflects that on the Saturday following the transmission of the telegram, there was a conversation between Pirolli, Sr., and Americo Pasquale, the union representative on the picket line, with reference to the telegram. According to Pasquale, Pirolli stated that the fellows received a telegram and that they could come back to work "any god damn time" they wanted but when they did they were going to be fired. Pirolli testified that Pasquale raised the issue of the telegram and accused Pirolli of utilizing it merely as a "legal loophole," i.e., as means of cutting off backpay. Pirolli denied that that was so and stated, "look, if they want to come back to work, let them come back to work."

Some of the employees who were standing nearby apparently overheard some parts of the conversation, but their testimony on this point is quite vague and ambiguous. For example, Robert Morrissey testified that he heard Pirolli, Sr., say that no matter what the telegram said "none of you bastards will work for me, or stay with me, or some sort of thing." David Anderson testified that Pirolli said, "I don't care what fellows come back. None of them would last a week or two." Ronald Ianazzi's testimony is to the same effect.

Paul Di Luzio testified that he never did receive the

telegram although, as the record reflects (G.C. Exh. 5(a)), his name was at the top of the list of the telegrams to be sent. In any event, 2 or 3 weeks later he advised Pirolli, Sr., that he never received one and the latter showed him a copy of it with Di-Luzio's name on it. Whereupon, Pirolli made the statement that it was no matter, "you know why I sent them telegrams out. Just let them come back, they'll probably last 2 or 3 weeks."

The record also reflects that, aside from the telegram, there were some conversations between the Respondent's agents on the one hand and the employees on the other respecting the latter's returning to work. Thus Pirolli, Sr., testified that the first such conversation occurred with Paul Cleary whom he met while the latter was working at the Plasti-Crete Company. Pirolli said that he understood that Cleary was interested in coming back to work but the latter said that he was not at that time — that he was happy where he was. Cleary testified that he did not return to work immediately because of the threat that Pirolli made on November 12, to wit, that if he ever came back on the property Pirolli would shoot him. He agreed that Pirolli offered him his job back sometime in December after Cleary commenced working for the Plasti-Crete Company.

Pirolli, Sr., testified that he received a telephone call from Windsor Bruce requesting to come back to work and Pirolli told him to come down and talk with him about it; that Bruce did come down and Pirolli hired him and he is still working for the Company; that about a week or two later, Larry Brophy called him and advised that he was "fed up with the Union" and asked for his job back; that he told Brophy to come down and see him; that Brophy started to work immediately and is still working there. Brophy testified that he received the telegram offering him reinstatement around November 25 but that he did not return to his job at that time; that he did, near the latter

part of December, call Pirolli and ask him if he could have his job back; that Pirolli told him to come down to his office and they would talk about it; that he did that and Pirolli asked him why he waited so long after receiving the telegram to come back, to which Brophy replied as follows:

> The Witness: What did I tell him? Well, the hunting season was on and at the time I really didn't need money, so I didn't feel I should go back to work. And there were people still picketing out there and I felt rather bad about going back to work if anybody was picketing. That's substantially what I said.
>
> Trial Examiner: Then, what did he say?
>
> * * *
>
> The Witness: He just told me I could have my old job back, if I wanted the job back, and I was willing to work, then I could have the job.
>
> Trial Examiner: And you said—
>
> The Witness: That I was willing to work and that I wanted the job.
>
> Trial Examiner: Did he tell you when to come in?
>
> The Witness: Yes. I started work then.
>
> Trial Examiner: Right then and there?
>
> The Witness: Yes.
>
> Trial Examiner: All right.
>
> Q. (By Mr. Kelleher) And you've worked there up to the present. Is that correct?
>
> A. Yes.

Pirolli testified that 2 or 3 days later he received a telephone call from Joseph Lynch who wanted to come back to work; that Lynch came down to see him and that Pirolli hired him; however, Lynch only worked 1 day and never

came back. According to Pirolli's testimony, he understood that Lynch went into the service.[25]

Pirolli testified that David Anderson called him the first week in January to inquire about his W-2 (statement of earnings) form, and also commented that he understood that Pirolli had rehired Bruce and Brophy. Pirolli inquired when Anderson wanted to come back to work and, according to Pirolli's testimony, Anderson replied that he could not come back that week because he was going to have his teeth extracted. Pirolli said to let him know when he wanted to return but that he did not hear from Anderson any more. Anderson acknowledged that he called Pirolli pertaining to his tax forms and that Pirolli started to tell him about Lynch and Cleary going back to work for him and asked Anderson, "how about you." Anderson testified that he responded as follows: "Yes, if the money was right and I got what I wanted and I didn't have to work on freight cars. And then he [Pirolli] said, 'all right, I'll call you Monday,' " but Anderson never heard from him.

The record reflects that shortly after the sending of the telegram offering reinstatement, employee Richard Cabelus (who had not signed a union card and who had remained in the employ of Respondent) met Ronald Ianazzi, Richard Malkasian, and Raffaele Franciosa at a cleaning establishment and they indicated to him that they wished to return to work. Cabelus advised them to go down and see Pirolli, Sr.—that Cabelus "[knew] he'll take you back. Just go down and see him." However, the three requested Cabelus to talk to Pirolli, Sr., for them and Cabelus agreed to do so. Cabelus then talked to Pirolli who told Cabelus to have them come and see him the following Monday, which message Cabelus passed on to Ianazzi. However, the latter, according to Cabelus' testimony, stated "I don't want to go up there. Have him come down and see us." Cabelus said

[25] Lynch did not appear as a witness at the hearing.

he did not want to be the middleman and dropped out of the picture. The short of the situation is that the employees did not go in to see Pirolli, Sr., and, as Pirolli testified, if they wanted their jobs back they were available but he was not "going all over the square looking for them." Franciosa testified that, not having heard from Pirolli on Monday, he called Respondent's office from a pay telephone the following day (with Ronald Ianazzi and Malkasian standing by); that he talked to Qualters who told him that Pirolli, Sr., was not there; that Franciosa advised that he had received a telegram to go back to work to which Qualters replied that "if we don't see you on the picket line for about 3 weeks period of time that we might call you."

Analysis and Concluding Findings as to the Offers of Reinstatement

It would seem (and I do not understand counsel for the General Counsel or counsel for the Charging Party to claim otherwise) that the November 25 telegram of Respondent to the employees constituted, on its face, a valid offer of reinstatement. Under these circumstances, it would seem to require clear and convincing proof that the offer did not mean what it purported to convey. In my view, the record evidence in this case does not rise to that standard.

The record reflects that the telegram was sent by Pirolli, Sr., in the context of some abortive settlement negotiations attempted as a result of the charges filed in this case. However, that fact, of course, does not detract from the effectiveness of the offer. What did detract from its effectiveness was the statement of Pirolli, Sr., on the picket line to the effect that the employees would not stay with the Company even if they accepted the offer.[26] This rather ambiguous statement could be interpreted to mean that the

[26] Credited testimony of Morrissey and Anderson, Pasquale was not impressive as a witness and his testimony, to the extent that it differs from that of the other employees, is not credited.

employees would not come back or "stay" unless they had a union. Moreover, whatever was stated on the picket line, the fact remains that three employees (Brophy, Joseph Lynch, and Bruce) did respond to the telegram and were reinstated. Another (Cleary), according to his own testimony, was offered—and declined—an offer of reinstatement by Pirolli, Sr. Anderson acknowledged the oral offer but attempted to attach conditions of his own as a prerequisite to returning to work. These facts certainly confirm the good faith of the offer and tend to negate the assertions of some of the employees that they were fearful of returning because of the threats made by the Pirollis on the first day of the picketing and/or the conversation between Pirolli, Sr., and Pasquale hereinabove referred to. Finally, I have considered, as was intimated by some of the testimony, that so long as the employees were picketing, none of them wanted to break the bond and cross the picket line.[27]

Accordingly, I find and conclude that the telegram sent by the Respondent on November 25 constituted a valid and binding offer of reinstatement to the named employees and I shall not require, in any recommended Order, that Respondent make a new offer of reinstatement.[28]

D. *The Alleged Refusal To Bargain*

The complaint alleges that the following constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

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[27] See, e.g., testimony of Brophy. I consider in the same category the reluctance of Malkasian, Ianazzi, and Franciosa to go into the premises to speak to Pirolli, Sr., directly.

[28] It appears that Poor did not receive the telegram until approximately 2 weeks after the other men received theirs; however, he conceded receiving such a telegram from Pirolli offering unconditional reinstatement to his prior position with full benefits and rights, but he never responded to the telegram. Di Luzio also contended that he did not receive the telegram although his name appeared on the list of employees to whom it was sent. However, he testified that after advising Pirolli, Sr., of the fact, Pirolli showed him a copy, thereby fulfilling Respondent's obligation to him in this respect.

All truck drivers, warehousemen and yardmen employed by Respondent at its Watertown, Massachusetts location, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in Section 2(11) of the Act.

Respondent does not contest the composition of the unit but rather contends that the Union did not represent a majority of its employees in said unit at the time the Union made its request for bargaining, as hereinabove described.[29] Since the Respondent's weekly payroll period runs from Thursdays through the following Wednesday, the appropriate payroll period for determining majority status in this case is that payroll period ending November 19, which is incorporated in the record herein as Respondent's Exhibit 1. On that payroll a total of 28 names appeared; however, it is noteworthy that the last 8 names are separated from the first 20 by a space. It is a reasonable inference that such separation indicates a difference in function and relationship of the latter 8 from the first 20 who, the record reflects, work either as truckdrivers or yardmen. Thus, two of the eight (Pirolli, Sr., and Qualters) are conceded supervisors and therefore excluded from the unit; three of the eight (Hagopian, Walker, and Carmel) are office clerical employees and likewise excluded from the unit. The remaining three (Michael, Robert, and John Pirolli) are sons of Pirolli, Sr. Michael P. (Pirolli, Jr.) is alleged in the complaint to be a Section 2(11) supervisor. The evidence showed, in essence, that he works full time at the Company's premises performing all of the jobs that the rank-and-file employees normally perform; that is, he drives and loads trucks, performs maintenance functions when needed, waits on customers, etc. However, he is, unlike the other rank-

[29] It will be recalled that the Respondent refused the letter containing such request on Friday, November 13.

and-file employees (except Duggan), paid on a salary basis and is apparently the only employee who fills in for Dispatcher Qualters while the latter is at lunch. He has no authority to hire and fire, but on one occasion did recommend a friend (Joseph Duggan) to his father for hiring and Duggan was hired. Unlike the other employees, Pirolli, Jr., does not punch a timecard and he concededly has taught some of the other employees how to perform their jobs and directs them in their work. However, such directions usually are instructions to give preference to one customer over another with respect to delivering orders. Nevertheless, it is clear that the employees consider the directions of Pirolli, Jr., to be tantamount to those of Pirolli, Sr., in view of the filial relationship. Under all circumstances, I find the situation here to be essentially the same as that described in the case of *Everett L. Harper, A Sole Proprietorship*,[30] where the Trial Examiner (affirmed by the Board), after finding the son in that case to be a supervisor within the meaning of Section 2(11) of the Act, stated:

> Moreover, in view of [the son's] relationship to the sole owner of Respondent, the small size of the work force, and the similarity of his concurrent statements regarding the Union to those of his father, I find that the employees were given reason to believe that [the son] was speaking for management and that he was in fact acting as a management agent (citing cases). I therefore find that Respondent is responsible for the statements and conduct of [the son].[31]

Based upon all of the foregoing, I find and conclude that

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[30] 169 NLRB 320.

[31] *Id.* at 324. The fact that the Respondent here is a closely held family corporation rather than a sole proprietorship does not alter the legal consequences. See *Foam Rubber City #2 of Florida, Inc., d/b/a Scandia*, 167 NLRB 623.

Pirolli, Jr., is excluded from the bargaining unit and that Respondent is responsible for his 8(a)(1) conduct described above.

The record reflects that Robert Pirolli is the son of Pirolli, Sr., that he attends high school and works for the Respondent after school hours and all day Saturday; that he operates the forklift truck and performs duties both in the yard and on the trucks. However, unlike other employees, he is paid a salary of $40 per week whether he works or not. The other son, John, is in college and works for the Respondent when he is home on vacation. Although he had not, in fact, worked for Respondent since the end of summer vacation until November 12, he was nevertheless carried on Respondent's payroll during the weeks ending October 29, November 5, November 12, and November 19, at a salary of $80 per week. When he is working during the vacation periods, John helps Dispatcher Qualters in shipping and in the office.

None of the sons of Pirolli, Sr., hold any office in the corporation nor do they own any stock therein. Although it is not entirely clear in the record, it appears that Pirolli, Sr., owns all or substantially all of the stock. Under these circumstances, I find and conclude that all of the sons should be excluded from the unit as "an individual employed by his parent" within the meaning of Section 2(3) of the Act.[32]

Although his name does not appear on Respondent's payroll, the Respondent would include in the unit as a regular part-time employee one David Cohen. It appears that Cohen, who is employed regularly by a business forms company, works for the Respondent usually on Saturdays and occasionally for a few hours during the week if he has time available. When working for the Respondent, he

[32] See *Printing Industry of Delaware*, 131 NLRB 1100, 1103; *Bridgeton Transit*, 123 NLRB 1196, 1197.

drives a truck and performs duties in the yard, for which he is paid $3 per hour in cash. Although he testified that he has been performing work on this basis for Respondent since August 1968, Respondent has no records of the number of hours he worked there. It is noteworthy that the Respondent never called Cohen to come in to work; rather, Cohen appeared when he had time and if Pirolli, Sr., did not have work for him to do, Cohen would leave.

On the basis of all of the foregoing, I find and conclude Cohen to be a casual or irregular part-time employee and, therefore, under established Board policy, excluded from the unit.[33]

Respondent contends that three of the card signers (Ronald Ianazzi, Philip Malkasian, and Raffaele Franciosa) should not be counted in determining the Union's majority status because they were "temporary" employees. The evidence shows that Ianazzi commenced working for the Respondent in May 1970, and he conceded that in his employment interview with Pirolli, Sr., he advised that he intended to return to college in December. However, he also testified that he would continue to work part time after he commenced classes if Pirolli would allow that. Malkasian conceded that when he was hired on November 3, he advised Pirolli that he was trying to get into the state police force and that he only expected to work for the Respondent until he got a job with the state police. However he was required to take a test and he did not pass the test. Franciosa testified that at the time he commenced work for the Respondent in October, he told Qualters (who hired him) that he would "probably just work until spring and he agreed to that."

The test of whether an employee should be considered "temporary" and therefore excluded from the unit appears

[33] See *Haag Drug Company, Incorporated*, 146 NLRB 798, 800; *Mrs. Alma Doran, d/b/a Doran Nut Sales Company*, 102 NLRB 1437, 1438; *Blade-Tribune Publishing Company*, 161 NLRB 1512, 1520, reversed on other grounds 180 NLRB No. 56.

to have been set forth by the Board in *E. H. Sargent and Company.*[34] In that case, a student was hired in August and quit his employment the following February. In his employment interview, the student advised the company that "he wanted a job in order to earn enough money to return to school, and that he had every hope of starting school again at the second semester around February 1...." The Board concluded that, "although it is true that [the student] did not intend to remain permanently with the Respondent, it does not appear that his arrangement with [Respondent] imposed any definite terminal date upon his employment. Neither in August nor in October, when he authorized the Union as his bargaining agent, could his expressed 'hope' to return to school in February be equated to any certainty that he would accumulate sufficient funds to accomplish his desire.[35]

Applying the foregoing test to the facts in the instant case, it is clear that the arrangement between Respondent and Malkasian and Franciosa imposed no definite terminal dates upon their employment. Although it appears that Ronald Ianazzi's arrangement may have imposed a more definite terminal date, I find it unnecessary to make that particular determination since even if he were excluded, the Union would still represent a clear majority (11 out of 19 in the unit).[36]

Accordingly, I find and conclude that as of November 13, the Union represented a majority of the Respondent's employees in an appropriate unit.

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[34] 99 NLRB 1318, 1320.

[35] *Id.*, at 1320.

[36] Also compare the testimony of Pirolli, Sr., who stated that he hired Joseph Duggan on a salary basis because "he was only going to be part time. He was waiting for another job to go to. This man has a major in mathematics and he was teaching school and he had approximately a month or two or three months that he didn't have much work, so we gave him a job and we paid him on a salary basis." Thus it appears that Duggan might be considered as "temporary" as Ianazzi.

There remains the question whether Respondent unlawfully refused to bargain pursuant to the Union's request. Respondent argues (p. 33 of its brief) that "a refusal to bargain cannot occur until the employer either receives the demand for bargaining or sends a reply to such demand, citing *Allegheny Pepsi-Cola Bottling Company* v. *N.L.R.B.*, [312 F.2d 529] 52 LRRM 2019 (3rd Circuit, 1962) and *N.L.R.B.* v. *Burton-Dixie Corporation*, [210 F.2d 199] 33 LRRM 2483 (10th Circuit, 1954)." However those cases are not in point because there, unlike here, the company did not abruptly refuse the communication from the union. Clearly, an employer may not escape his duty under the Act by refusing to receive a communication from the union in the ordinary course of business. See *N.L.R.B.* v. *Columbian Enameling & Stamping Co., Inc.*, 306 U.S. 292, 297; *Quick Shop Markets, Inc.*, 168 NLRB 180, 188.[37]

As found above, the Respondent, upon learning that a large number of its employees had signed union cards, embarked upon a campaign of extensive and flagrant unfair labor practice including threats of reprisal and discharge of the employees who had joined the Union. One would be hard pressed to imagine conduct which is more antithetical to the collective-bargaining principle, and obviously rendered nugatory any opportunity to resolve the representation question through the processes of an NLRB-conducted election. Accordingly, I will recommend that the Respondent be ordered to bargain with the Union at its request

[37] The Board's finding of 8(a)(5) violation in the latter case was reversed by the Court of Appeals for the Seventh Circuit (416 F.2d 601, 606, October 9, 1969) on the ground that "the unopened registered letter containing a demand to bargain, *which was validly refused pursuant to a company policy*, was not sufficient to convey a clear demand to bargain." Here, Pirolli, Sr., made abundantly clear that he did not refuse the Union's letter pursuant to any general company policy but specifically because the envelope on this particular letter reflected that it emanated from the Union.

as the exclusive collective bargaining representative of its employees in the aforesaid unit.[38]

IV. *The Effect of the Unfair Labor Practices Upon Commerce*

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. *The Remedy*

It having been found that Respondent commited certain unfair labor practices, it must be ordered to cease and desist from engaging further in such conduct and to take remedial actions designed to effectuate the policies of the Act. The Respondent unlawfully refused to bargain with the Union on demand; accordingly, it must be ordered to bargain with that Union, in the unit found appropriate, upon demand, and in the event an agreement is reached

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[38] *N.L.R.B.* v. *Gissel Packing Company*, 395 U.S. 575; *United Packing Company of Iowa, Inc.*, 187 NLRB No. 132; *George J. Roberts & Sons, Inc., d/b/a The Roberts' Press*, 188 NLRB No. 51.

At the hearing, Respondent sought to introduce evidence of union misconduct on and off the picket line for the purpose of barring a bargaining order should the Trial Examiner find an 8(a)(5) violation. *World Carpets of New York, Inc.*, 188 NLRB No. 10, and cases cited. In my view, the evidence sought to be adduced at that time would have been premature and speculative inasmuch as I had not determined whether a violation had occurred. Accordingly, I allowed the Respondent to make a full and complete offer of proof respecting the evidence sought to be offered on this issue. After hearing such offer, I was of the opinion at that time, and remain of the opinion, that the evidence does not rise to the standard, and was of not such a nature, as to deny to the Union a remedial order requiring the Respondent to bargain therewith.

to embody such understanding in a signed agreement. It having been found that Respondent unlawfully discriminated against its employees by discharging them, it must be ordered to reinstate them (to the extent it has not already done so), and make them whole for any loss of earnings they have suffered in consequence of the unlawful discrimination in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Respondent's unfair labor practices indicate a general attitude of opposition to the purposes of the Act. Accordingly, a broad cease-and-desist order is necessary and appropriate to effectuate the policies of the Act.

Upon the foregoing findings of fact and upon the entire record in this case, I make the following:

Conclusions of Law

1. M. J. Pirolli & Sons, Inc., Respondent herein, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Local Union No. 379, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All truck drivers, warehousemen and yardmen employed by Respondent at its Watertown, Massachusetts, location, excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Union was, on November 7, 1970, and at all times thereafter has been, the exclusive collective-bargaining representative of the Respondent's employees in the afore-

said appropriate unit within the meaning of Section 9(a) of the Act.

5. By refusing to bargain with the Union as the collective-bargaining representative of its employees in an appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By discriminating against Mark J. Lynch, David Anderson, Lawrence Brophy, Windsor Bruce, Paul Cleary, Paul Di Luzio, Raffaele Franciosa, Ronald M. Ianazzi, Joseph Lynch, Philip Malkasian, Robert Morrissey, and Leslie Poor, the Respondent has engaged in conduct to discourage membership in the Union in violation of Section 8(a)(3) and (1) of the Act.

7. By the foregoing conduct, by coercively interrogating employees concerning their activities, by threatening reprisals for joining the Union, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[39]

ORDER

M. J. Pirolli & Sons, Inc., its officers, agents, successors, and assigns, shall:

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[39] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Refusing to bargain collectively in good faith with Teamsters Local Union 379, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of its employees in the aforesaid appropriate unit.

(b) Discharging or otherwise discriminating against its employees because of their union membership and activities.

(c) Coercively interrogating employees concerning their union activities, threatening reprisals for joining the Union or engaging in union activities, or in any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit described above with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and if an understanding is reached embody such understanding in a signed agreement.

(b) Offer to Mark J. Lynch immediate, full, and unconditional reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him and the employees named below whole for any loss of pay which they may have suffered as a result of the discrimination against them in the manner set forth in that portion of this Decision entitled "The Remedy": David Anderson, Lawrence Brophy, Windsor Bruce, Paul Cleary, Paul Di Luzio, Raf-

faele Franciosa, Ronald Ianazzi, Joseph Lynch, Philip Malkasian, Robert Morrissey, and Leslie Poor.

(c) Notify immediately Mark J. Lynch, if presently serving in the Armed Forces of the United States, of his right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its premises in Watertown, Massachusetts, copies of the attached notice marked "Appendix."[40] Copies of said notice, on forms provided by the Regional Director of Region 1, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[41]

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[40] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[41] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified

IT IS FURTHER RECOMMENDED that the allegations of the complaint be dismissed in all respects other than those found to have been sustained in the above findings and conclusions.

Dated at Washington, D.C., Aug. 17, 1971.

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to read: "Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse to bargain collectively with Teamsters Local Union 379, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL bargain collectively, upon request, with this Union as the exclusive representative of all our employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and if an understanding is reached embody such understanding in a signed agreement.

The bargaining unit is:

> All truck drivers, warehousemen and yardmen excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT discharge or otherwise discriminate against employees because of their union membership, activities, or sympathies.

WE WILL NOT coercively interrogate employees concerning their union activities.

WE WILL NOT threaten our employees with reprisals if they join the Union or otherwise engage in union activities.

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other

mutual aid or protection, or to refrain from any or all such activities.

WE WILL offer Mark Lynch immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for all losses he may have suffered by reason of our discrimination against him.

WE WILL make whole the employees named below for any loss of pay which they may have suffered as a result of the discrimination against them:

David Anderson
Lawrence Brophy
Windsor Bruce
Paul Cleary
Paul Di Luzio
Raffaele Franciosa
Ronald Ianazzi
Joseph Lynch
Philip Malkasian
Robert Morrissey
Leslie Poor

M. J. PIROLLI & SONS, INC.
(Employer)

Dated ———— By ————————————
(Representative) (Title)

We will notify Mark Lynch, if presently serving in the Armed Forces of the United States, of his right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Bulfinch Building, 15 New Chardon Street, Boston, Massachusetts 02114, Telephone 617—223-3330.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
[CAPTION OMITTED]

DECISION AND ORDER

On August 17, 1971, Trial Examiner Robert Cohn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceedings to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings,[1] and conclusions[2] and to adopt his recommended Order.

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[1] For the reasons set forth in his separate opinion in *United Packing Company of Iowa, Inc.*, 187 NLRB No. 132, Chairman Miller concurs in the issuance of the bargaining order but only on the basis of Respondent's serious violations of Section 8(a)(1) and (5), as set forth in the attached Trial Examiner's Decision.

[2] The Respondent has excepted to certain credibility findings made by the Trial Examiner. It is the Board's established policy not to overrule a Trial Examiner's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions were incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

ORDER

Pursuant to Section 10(e) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that Respondent, M. J. Pirolli & Sons, Inc., Watertown, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order.

Dated, Washington, D.C. Nov. 18, 1971

EDWARD B. MILLER, *Chairman*
JOHN H. FANNING, *Member*
HOWARD JENKINS, JR., *Member*
NATIONAL LABOR RELATIONS BOARD

[SEAL]

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-379

M. J. PIROLLI & SONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board found that petitioner ("the Company") violated Section 8(a)(1) and (3) of the National Labor Relations Act (Pet. 15) by coercively interrogating its employees about their union activities and threatening them with discharge if they joined Teamsters Local Union No. 379 ("the Union"), and by discharging employee Lynch and 11 others because of their union membership (A. 290-301, 311, 330-331).[1] The Board further found that

[1] "A." refers to the appendix to the briefs in the court of appeals.

the Union had valid authorization cards from a majority of the employees in an appropriate unit (A. 308), that the Company's "extensive and flagrant unfair labor practices * * * [had] rendered nugatory the processes of an NLRB-conducted election" (A. 309), and that the Company violated Section 8(a)(5) and (1) of the Act (Pet. 15) by refusing to bargain with the Union (A. 311). The Board ordered the Company to cease and desist from the unfair labor practices found, to offer employee Lynch reinstatement[2] and to make him and the 11 other employees whole for any loss of earnings they may have suffered as a result of the Company's discrimination, and to bargain with the Union upon request (A. 312-314, 331). The court of appeals enforced the Board's order (Pet. 14).

2. Petitioner does not contest the Board's findings that it violated Section 8(a)(1) and (3) of the Act, and that it refused to bargain though the Union had valid authorization cards from a majority of the employees in an appropriate unit. Petitioner's sole contention is that the Board improperly issued a bargaining order, since it failed "to consider or analyze the cleansing effect of a valid reinstatement offer to petitioner on the election atmosphere" (Pet. 2). This issue does not warrant review by this Court. Although the Trial Examiner, whose findings the Board

[2] The Board found that, on November 25, 1970, the Company had made a valid offer of reinstatement to the 11 other employees, and hence did not require a new offer of reinstatement to them (A. 302-303).

adopted, did not specifically allude to the offer of reinstatement in concluding that a bargaining order was appropriate (A. 309), he fully discussed the offer earlier in his decision, finding that the Company President had made remarks on the picket line that detracted from the effectiveness of the offer and that only three employees accepted it (A. 302). In these circumstances, and in view of the flagrant nature of the Company's earlier unfair labor practices, the Examiner and the Board were reasonable in concluding that it was not possible "to resolve the representation question through the process of an NLRB-conducted election" (A. 309), and that therefore a bargaining order was warranted. *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 613-614.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

SEPTEMBER 1972.

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RESPONDENT.

REPLY BRIEF TO MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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RESPONDENT.

REPLY BRIEF TO MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. The National Labor Relations Board in its Memorandum For The National Labor Relations Board In Opposition in the instant case attempts to answer the Petitioner's key argument that the Board and its Trial Examiner failed to analyze Petitioner's reinstatement offer in the context of their discussion of the need for issuance of a bargaining order by the following statement:

> ". . .he [the Trial Examiner] fully discussed the offer earlier in his decision, finding that the Company President had made remarks on the picket line

> that detracted from the effectiveness of the offer and that only three employees accepted it." (Res. 3)

This, in effect, is a gratuitous attempt to minimize the importance of the reinstatement offer. However, the statement is misleading because taken out of context. What the Trial Examiner actually said was:

> "The record reflects that the telegram was sent by Pirolli, Sr., in the context of some abortive settlement negotiations attempted as a result of the charges filed in this case. However, that fact, of course, does not detract from the effectiveness of the offer. What did detract from its effectiveness was the statement of Pirolli, Sr., on the picket line to the effect that the employees would not stay with the Company even if they accepted the offer. This rather ambiguous statement could be interpreted to mean that the employees would not come back or 'stay' unless they had a union. Moreover, whatever was stated on the picket line, the fact remains that three employees (Brophy, Joseph Lynch, and Bruce) did respond to the telegram and were reinstated. Another (Cleary), according to his own testimony, was offered — and declined — an offer of reinstatement by Pirolli, Sr. Anderson acknowledged the oral offer but attempted to attach conditions of his own as a prerequisite to returning to work." (A. 26, 27).[1]

The Trial Examiner went on to conclude:

> "These facts certainly confirm the good faith of the offer and tend to negate the assertions of some of the

[1] "A" refers to Appendix To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit.

employees that they were fearful of returning because of the threats made by the Pirollis on the first day of the picketing and/or the conversation between Pirolli, Sr., and Pasquale hereinabove referred to. Finally, I have considered, as was intimated by some of the testimony, that so long as the employees were picketing, none of them wanted to break the bond and cross the picket line.

Accordingly, I find and conclude that the telegram sent by the Respondent on November 25 constituted a valid and binding offer of reinstatement to the named employees and I shall not require, in any recommended Order, that Respondent make a new offer of reinstatement." (A. 27).

This finding totally vitiates Respondent's attempt to negate the impact of the offer.

2. General Counsel is also attempting to justify its conclusion that "the Examiner and the Board were reasonable in concluding that it was not possible 'to resolve the representation question through the process of an NLRB-conducted election'." (Res. 3) by attempting to perform the type of analysis of the reinstatement offer's effect on future election conditions that the Board itself should have performed. However, it is the Board's "fund of knowledge and expertise" that this Court has held must be utilized in determining appropriate remedies and performing the attendant scrutiny of relevant factors, not the knowledge or expertise of General Counsel. *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575 at 612, n. 32.

This *ex post facto* attempt at retrieval must fail since the singular fact remains that neither the Trial Examiner nor the Board, as alleged in Petitioner's Petition for a Writ of Certiorari, performed their duty of consider-

ing *all* relevant factors, including the reinstatement offer, before issuance of an order to bargain. Therefore, it is respectfully submitted that the Board was not "reasonable" in concluding that a bargaining order was warranted. (Res. 3)

The petition for a writ of Certiorari should be granted.

Respectfully submitted,

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